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Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Holmgren Brothers Inc v. Ballard*, No. 13844.00 (Utah Supreme Court, 2001).
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UTAH SUPREME COURT

BRIEF

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STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

HOLMGREN BROTHERS, INC., a
Utah Corporation,
Plaintiff and Respondent,

vs.

GERALD BALLARD a/k/a THOMAS
G. BALLARD & WINONA BAL-
LARD, his wife & SEYMOUR
GREAVES, a single man,
Defendants and Appellants.

Case No.

13844

BRIEF OF APPELLANTS

Appeal from Judgment of the First Judicial
District Court for Box Elder County
Honorable VeNoy Christofferson, Judge

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Court, Utah

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

HOLMGREN BROTHERS, INC., a
Utah Corporation,
Plaintiff and Respondent,

vs.

GERALD BALLARD a/k/a THOMAS
G. BALLARD & WINONA BAL-
LARD, his wife & SEYMOUR
GREAVES, a single man,
Defendants and Appellants.

Case No.

13844

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

Plaintiff in the above entitled case brought action pursuant to an oral contract for the sale of real property between defendants-sellers and plaintiff-buyer. Plaintiff complains that defendants have refused to complete the sale of the property pursuant to that oral contract and asks for specific performance of that contract or damages. Defendants assert that said sale is void under the statute of frauds.

DISPOSITION OF CASE IN LOWER COURT

The District Court of Box Elder County, Judge VeNoy Christofferson presiding, ruled that defendants execute and deliver a warranty deed to plaintiff and that plaintiff pay to defendants \$18,500.00. The court further ruled that defendants deliver to the court a deed from the prior record owner of the property in question; restrained defendants from going on the property and awarded plaintiff costs.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendants seek dismissal of the action in that the oral contract for the sale of the property is void under the statute of frauds, U. C. A. 25-5-3. In the alternative, defendants submit that the lower court erred in requiring specific performance of the oral agreement and that the matter should be remanded to the trial court with instructions that plaintiff prove the value of the services performed and benefits conferred by him on defendants in order for any recovery.

STATEMENT OF FACTS

In June 1973 Gerald Ballard (hereafter defendant) orally agreed with Holmgren Brothers, Inc. (hereafter plaintiff) to convey to plaintiff approximately 160 acres of real property situated in Hansel Valley, Box Elder County (Tr. 4, 5). Defendant thought the property was free and clear and intended to convey title to plaintiff as it then stood (Tr. 8, 14, 15, 16). However, at that time

defendant was subject to several outstanding judgments and plaintiff insisted that these judgments be paid prior to closing the sale (Tr. 10, 43, 44). Defendant objected to this arrangement and informed plaintiff that he was unwilling to sell the subject property under the terms insisted on by plaintiff (Tr. 8, 9, 39, 45, 50). Plaintiff then placed with Jack Shumway a check made payable to First Security Bank Agent for the amount of the purchase price which check was to be forwarded to defendant at some future date (Tr. 17-23). This check was never delivered to defendant and defendant was never paid for the land (Tr. 23, 44). Defendant refused to allow plaintiff to take possession of the subject property (Tr. 8). Subsequently plaintiff visited defendant on at least two occasions to see if it was still possible to put the deal together (Tr. 45).

In late August or early September, plaintiff and defendant discussed weeding of the property and plaintiff was given permission by defendant to enter upon and weed the property for the purpose of protecting plaintiff's possible future investment (Tr. 8, 46). At that time the sale was still uncertain (Tr. 46, 47). Shortly thereafter defendant finally and completely repudiated and withdrew the offer and oral contract of sale (Tr. 8, 9, 39, 45, 50). Approximately one week later, after consulting with his attorney, plaintiff entered the property without permission for the purpose of disking and planting the ground (Tr. 49). Plaintiff admitted that he was told by defendant that the "deal was off" about one week prior to the date he disked and planted the property and that

part of plaintiff's motive in disking and planting the property was to help enforce the oral contract by avoiding the statute of frauds (Tr. 39, 49). There was never any writing setting forth the terms of the oral agreement and Mrs. Ballard was not included in any of the discussions of sale (Tr. 47, 50). Plaintiff then brought the instant action against defendants for specific performance.

ARGUMENT

POINT I.

THE PLAINTIFF SHOULD NOT BE GRANTED SPECIFIC PERFORMANCE OF THE ORAL CONTRACT FOR THE SALE OF LAND BETWEEN HOLMGREN BROTHERS, INC. AND GERALD BALLARD BECAUSE THAT CONTRACT IS VOID UNDER 25-5-3 UTAH CODE ANNOTATED (1973 Supp.).

25-5-3 Utah Code Annotated (1973 Supp.) states:

Every contract for . . . the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

The alleged contract for the sale of land between plaintiff and defendant was not in writing and there was no

written note or memorandum of said alleged contract. Thus the alleged agreement clearly falls within U. C. A. 25-5-3 and is therefore void. This is true even where the terms of the oral contract are perfectly clear; the oral contract is still void under the statute of frauds, *Woolley Loose*, 57 Utah 336, 194 P. 908 (1920).

POINT II.

THERE WAS NOT SUFFICIENT PART PERFORMANCE BY PLAINTIFF TO TAKE THE ORAL CONTRACT OUT OF THE STATUTE OF FRAUDS.

Under certain narrow circumstances an oral contract is enforced by the courts as an exception to U. C. A. 25-5-3 under U. C. A. 25-5-8 which allows the courts to compel specific performance in cases where sufficient partial performance of the oral contract has been completed.

The Utah Supreme Court has adopted minimum standards for partial performance which must be met if the statute of frauds is to be avoided. As discussed hereinafter, to avoid the statute of frauds or to invoke estoppel to assert the statute of frauds, a three part test must be met:

(1) There must be possession with the acquiescence of the seller, (2) there must be material improvements on the land, (3) there must be payment for the land.

In addition, in order for the appropriate remedy to be specific performance, a four part test must be met:

(1) The person performing must rely on the oral contract to his detriment or injury, (2) the injury must be of a sort that is not compensable through other means, (3) enforcement of the statute of frauds must otherwise operate to perpetrate a fraud on the performer, and (4) the terms of the oral contract must be clear and certain. An examination of each of these elements shows the plaintiff to have no cause of action in the instant case.

(a) *Plaintiff did not have possession of the property with the acquiescence of defendant.*

Mere presence on the land does not constitute possession. Possession must not only be actual and open but it must also be definite and exclusive, and not concurrent with that of the vendor. It must indicate the commencement of a new estate or interest. *Price v. Lloyd*, 31 Utah 86, 86 P. 767 (1906). In *In re Madsen's Estate*, 123 Utah 327, 359 P. 2d 595 (1953), the court defined partial performance as "at least partial payment plus possession with the *acquiescence or consent of the seller*." In the same case the court held that possession must pass under the contract.

In the instant case plaintiff's presence on the land was clearly not possessory. First, the weeding activity was only engaged in to protect a possible future investment or interest. Defendant arranged to pay plaintiff for the value of that work in the event the sale was

not consummated (Tr. 8, 9). It was not a possessory act and did not constitute partial performance. Holmgren did not rely on the oral agreement of sale, but instead went to Ballard and discussed the weeding with him. He asked and was granted permission to enter upon the land for the purpose of weeding and there was an actual or implied separate agreement for the weeding (Tr. 8, 9, 46).

Second, the disking and planting done by plaintiff were performed only after defendant expressly withdrew and repudiated any offer or oral contract of sale. Plaintiff thus did not rely on the oral contract in acting to disk and plant the ground. He performed only after consulting with counsel and approximately one week after defendant repudiated the oral contract (Tr. 49). Immediately after planting was begun, plaintiff was again approached by defendant and told that defendant was unwilling to sell the ground and to stop planting and leave the property (Tr. 50). Plaintiff acted not in reliance upon the oral contract, but after the fact, in the express and admitted desire to avoid the statute of frauds (Tr. 39, 48, 69). Plaintiff's acts were not in good faith, and under the circumstances, to specifically enforce the oral contract would work a fraud on defendant.

All possessory acts by plaintiff were made only after the agreement was clearly repudiated by defendant on at least two occasions and those actions and the risks appurtenant thereto were taken voluntarily by plaintiff

and alternative remedies are available to compensate for the weeding and planting if appropriate.

- (b) *Plaintiff did not make improvements on the land sufficient to be considered as part performance.*

Merely making improvements will not alone take an oral contract out of the statute of frauds, *Clark v. Clark*, 74 Utah 290, 279 P. 509 (1929). Improvements must be permanent and valuable in nature to be considered as partial performance. In *Price v. Lloyd, supra*, the court held that such improvements must have a substantial or permanent character. The improvements must be permanently beneficial to the land and involve a sacrifice to him who made them. They must be made in reliance on the oral contract (see also *In re Madsen's Estate, supra*), and the value of the improvements made must exceed the rental value of the premises.

[The improvements must be] regarded as of such a substantial value and character as to constitute part performance so as to take the case out of the statute. *Price v. Lloyd, supra*.

Mercur Gold Mining Co. v. Herschel Gold Mining Co., 103 Utah 249, 134 P. 2d 1094 (1943), discusses the standard of sufficiency for improvements for partial performance as adopted by the Utah Supreme Court. In *Mercur*, the court required the financial investment to be of major proportion to the property in order to constitute part performance. In that case, the improvements

were not only permanent and valuable, they were also unique and therefore not compensable through money damages. In addition, *Price v. Lloyd*, *supra*, held that a finding based on the evidence that the improvements made to the subject property were permanent and valuable is required before the court can take notice of such facts. And *Easton v. Wycoff*, 4 Utah 2d 386, 295 P. 2d 332 (1956), requires the possession and improvements to be in reliance on the oral contract and requires detriment or injury to the party relying on the oral contract.

In the instant case the weeding did not constitute a permanent improvement. It is rather the type of improvement that a tenant on land might make which is distinguished from a permanent improvement in *Price v. Lloyd*, *supra*. An alternative remedy that defendant pay plaintiff for the weeding performed is clearly available.

Further, the disking and planting were not sufficient improvements under the partial performance standard to avoid the requirements of the statute of frauds. Neither disking nor planting is a permanent improvement. Since the planting, plaintiff has harvested and sold the wheat planted. By the date of trial the property was substantially in the same condition that it was in at the date of the oral contract for sale.

Plaintiff has received the benefit of the use of the land without paying any compensation to defendant in the form of rent or otherwise. It is noted that there has been no evidence placed before the court by the plaintiff

showing the amount of damages suffered through planting and disking the land. Plaintiff made no permanent improvements on the land.

(c) *Defendant was never paid for the land.*

The evidence indicates that the only payment made by plaintiff was in the form of a check made payable to First Security Bank, Agent, and delivered to Jack Shumway, an officer of said bank, which payment was to be forwarded to defendant at some future date (Tr. 17-33). Defendant never received that payment (Tr. 23, 24). Defendant never asked for payment (Tr. 23) and plaintiff never instructed Mr. Shumway to deliver the payment to defendant (Tr. 23, 44).

Even if payment had been made it is clear that mere payment of pecuniary consideration is not sufficient justification for specifically enforcing an oral contract to convey land. 3 WILLISTON ON CONTRACTS §494, *Ravarino v. Price*, 123 Utah 559, 260 P. 2d 570 (1953), 33 A. L. R. 579 (1924).

The instant case fails entirely to meet this standard for avoiding the statute of frauds. The tender of payment was not to nor has it ever been in the possession of defendant. It was a check made out to a third party and tendered to that third party. It was never paid to defendant and plaintiff suffered no *injury or detriment* as a result of placing the check which was never cashed in the hands of said third party.

- (d) *Specific performance is not an appropriate remedy in this case.*

Specific performance is an extreme remedy. It should be used only when no other remedy would be adequate and any other remedy would result in a *fraud* being worked on the performing party and is not applicable in this case:

(1) As already discussed, plaintiff did not rely on the oral contract in entering on or working on the property.

(2) All improvements made by plaintiff are compensable without specific performance.

(3) In order for a fraud to be perpetrated the party performing must be acting in good faith and the performance must be of such a nature so as not to be compensable except through specific performance. *Baugh v. Darley*, 112 Utah 1, 184 P. 2d 335 (1947):

Utah law is clear that to enforce the contract in equity the services rendered must be of such nature that the value thereof cannot be ascertained with reasonable accuracy in an action at law, and be adequately compensated for by the recovery of damages. *Brinton v. Van Cott*, 8 Utah 480, 33 P. 218, (1898), *Randall v. Tracy Collins Trust Company*, 6 Utah 2d 18, 305 P. 2d 480 (1956).

The case law clearly requires the perpetration of a fraud as a minimum standard for avoiding the statute of

frauds. The doctrine of part performance is only to be applied with great care, with particular attention to the statute of frauds and the historical precedent therefore. In the case of *Ravarino v. Price*, *supra*, where the court held that a tender of purchase price plus related acts of partial performance were not sufficient to take the oral contract out of the statute of frauds, the court articulated the following standard:

Courts of equity, in establishing the doctrine involved by plaintiff have not, by any means, intended to annul the statute of frauds, *but only to prevent its being made the means of perpetrating fraud*. In order that a plaintiff may be permitted to give evidence of a contract not in writing, and which is in the very teeth of the statute and a nullity of law, it is essential that he establish, by clear and positive proof, acts and things done in pursuance and on account thereof, exclusively referable thereto and which take it out of the operation of the statute. (Emphasis added.)

In *Mercur Gold Mining Co. v. Herschel Gold Mining*, *supra*, the Supreme Court held that partial performance which will avoid the statute of frauds must consist of an act which puts the party performing in such a position that the non-performance of the other party would constitute *fraud*. Thus the statute of frauds, the case law, and U. C. A. 25-5-3 require the circumstance of fraud to exist before partial performance is allowed to compel specific performance of the contract. In addition, the

cases require that the performing party be injured and that such injury be unjust and unconscionable, such that there is no complete or adequate remedy at law.

In *Easton v. Wycoff, supra*, the court in denying an equitable estoppel argument to assert the statute of frauds stated,

It is an indispensable element of equitable estoppel that the person relying thereon must have been induced to act or alter his position to his detriment or injury and *where equitable estoppel is relied on to preclude another from asserting the statute of frauds as a defense to an oral contract . . . such injury must be unjust and unconscionable, and such that there is no complete and adequate remedy at law available to the person asserting equitable estoppel.* (Emphasis added.)

It is clear that fraud is a necessary element of any argument that an oral contract for the sale of land should be specifically enforced. Yet plaintiff has failed to even mention fraud at any place in the record (R. 88-90, 97-101). Rule 9 of the Utah Rules of Civil Procedure requires that fraud be plead with particularity.

Rule 9. Pleading Special Matters.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

In the instant case failure to specifically enforce this contract will clearly not work a fraud on plaintiff. Plaintiff fails to meet any of the standards for fraud herein set forth.

(4) In addition, to enforce an oral contract by waiving the statute of frauds the terms of that oral contract must be established to a greater degree of certainty than would be required to establish the same contract in an action where the contract is written. *Montgomery v. Barrett*, 40 Utah 385, 121 P. 569 (1912). The oral agreement between the parties here is not clear and unambiguous as required by law. There is disagreement as to a material fact. Plaintiff alleges that defendant was required as part of the oral agreement to first pay off his existing judgments. Defendant contends that that was not part of the oral agreement. Therefore, the first standard for avoiding the statute of frauds, that of clear specificity of agreement, has not been met. The statute was designed to prevent this kind of contention over terms in contracts for the sale of land. Furthermore, Mrs. Ballard was not included in any of the discussions or agreements of sale (Tr. 47, 50).

The terms of this oral contract are not clear enough to be specifically enforced in equity. This issue goes to the heart of the alleged oral contract and reinforces the statutory requirement of writing. Such oral contracts are void. Utah Code Annotated, 25-5-3 (1973 Supp.).

CONCLUSION

Plaintiff has completely failed to meet standards accepted by the Utah Supreme Court for partial performance sufficient to avoid the statute of frauds. The partial performance did not meet the *Mercur* or the *Price v. Lloyd* standard and material parts of the agreement are unclear. All of the improvements made are compensable without the requirement of specific performance. None are permanent or unique.

There was never possession with the acquiescence or consent of the seller. The weeding was not possessory under the oral contract. The weeding was done by separate agreement between the parties to protect the possible future interest that plaintiff might have in the land.

The later entry on the land for planting was done only after the repudiation of the oral contract. Defendant clearly objected to any possession by plaintiff and plaintiff knew that he entered the land in violation of the defendant's rights and wishes. There was no reliance by plaintiff on the oral contract. He acted not in good faith, but with the express purpose of avoiding the statute of frauds.

The statute of frauds is a valid and necessary part of the body of law of the state of Utah. Part of its value lies in promoting certainty in contracting. This is evident in the instant case. The parties never had a meeting of the minds. The terms of the purchase and sale were never clear as between the parties and plaintiff's

claim for specific performance is exactly the kind of abuse the statute is designed to prevent.

The late Professor Karl Llewellyn is quoted as saying:

After two centuries and a half the statute stands, in essence better adapted to our needs than when it was first passed . . . [T]he net effect of the two rules together [the statute and the parol evidence rule], as they work into lay practice, and viewed simply in their effect outside of litigation, is almost certainly wholesome; both encouraging permanent trustworthy record of agreements, and in inducing care in the making of that record.

Llewellyn, Contracts — An Essay in Perspective, 40 Yale L. J. 704, 747-48 (1931).

Respectfully submitted,

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